Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling	)	
Obligations of Incumbent Local Exchange	)	CC Docket No. 01-338
Carriers	)	
	)	
Implementation of the Local Competition	)	
Provisions of the Telecommunications Act	)	CC Docket No. 96-98
of 1996	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.

Sharon J. Devine
Michael B. Adams, Jr.
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 672-2752

Counsel for

QWEST COMMUNICATIONS
INTERNATIONAL INC.

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SUMMARY

Qwest Communications International Inc. ("Qwest") supports the Commission's proposal to modify the pick-and-choose rule. Under this proposal, the pick-and-choose rule would continue to apply to all interconnection agreements between ILECs and CLECs until an ILEC files a statement of generally available terms and conditions (or "SGAT") with state regulators, pursuant to Section 252(f) of the Communications Act. Once the SGAT is available to carriers, it would essentially serve as a standardized interconnection agreement for CLECs, and the current pick-and-choose rule would thereafter apply only to terms taken from the SGAT. On a separate path, CLECs would still be able to engage in specialized interconnection agreements with ILECs. Other carriers would still be able to opt in to the terms of these agreements, but only in their entirety.

There are strong policy reasons for modifying the pick-and-choose rule in this manner. Based on its own experiences, Qwest believes that in its current form, the rule is actually interfering with the ability of ILECs and CLECs to engage in the dynamic, innovative interconnection negotiations intended by the Telecommunications Act of 1996. Qwest also believes that the pick-and-choose rule has largely outlived its usefulness as an antidiscrimination measure, due to the increasing competitiveness of the wholesale market, the good-faith negotiation requirement of Section 251(c)(1), and the Communications Act's general prohibition against unjust and unreasonable discrimination. Qwest agrees with the Commission that once SGATs are available as standard terms under which CLECs could obtain interconnection, UNEs and resale, it makes sense to permit those carriers which wish to engage in individual negotiations and customized arrangements to do so, free of the pick-and-chose rule. Qwest

believes that this choice of paths towards interconnection agreements would ultimately benefit both CLECs and ILECs.

Lastly, Qwest believes that the Commission has the legal authority to modify the current pick-and-choose rule. Neither the plain language of Section 252(i) nor judicial precedent such as the Supreme Court's *Iowa Utilities Board* decision prevent the Commission from altering the pick-and-choose rule from its current form, and that the modifications proposed in the *FNPRM* are a reasonable interpretation of the statute.

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In the Matter of	)	
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Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") respectfully submits these Comments in response to the Federal Communications Commission's ("Commission") *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* in CC Docket Nos. 01-338, 96-98 and 98-147 ("*FNPRM")*.[1] Qwest agrees that the Commission should alter its interpretation of Section 252(i) of the Communications Act of 1934, as amended ("Communications Act"), and limit the application of its current "pick-and-choose" rule governing carrier interconnection agreements.

[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36 ¶ 581 (rel. Aug. 21, 2003), *appeals pending sub nom. United States Telecom Association and SBC Communications Inc. v. FCC*, Nos. 03-1310, *et al.* (D.C. Cir. Oct. 1, 2003).

I. INTRODUCTION

Qwest is the parent company of Qwest Corporation ("QC"), an incumbent local exchange carrier ("ILEC") that operates in a fourteen-state region of the western United States. As an ILEC, QC regularly negotiates interconnection agreements with competitive local exchange carriers ("CLECs"), and when it does so, it is subject to Section 51.809(a)-(c) of the Commission's Rules in these negotiations, which enables QC's wholesale customers to opt into individual portions of other carriers' interconnection agreements with QC, without having to accept the terms of the entire contract. This requirement has appropriately been dubbed the "pick-and-choose" rule.

Based in part on a proposal by Mpower Communications Corp. ("Mpower"), the *FNPRM* has suggested amending the pick-and-choose rule so that it will apply only in certain circumstances.[2] Under the *FNPRM*'s proposal, the pick-and-choose rule would continue to apply to an ILEC's negotiated interconnection agreements until such time that the ILEC files a statement of generally available terms and conditions, pursuant to Section 252(f) of the Communications Act. Once an ILEC has filed its SGAT with state regulators, and obtained approval of its terms, the current pick-and-choose rule would thereafter apply only to terms taken from the SGAT (which would essentially serve as a standardized interconnection agreement).[3] CLECs would be able to engage in specialized interconnection negotiations with ILECs, and the agreements reached in these negotiations would no longer be subject to the pick-and-choose rule. Other carriers could only opt into them in their entirety.[4] The *FNPRM* suggests that the use of the SGAT would guarantee competitors access to "a minimum set of terms and conditions for

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2 *See FNPRM* ¶ 726.

3 *Id.* ¶ 713 and ¶ 725.

4 *Id.* ¶ 725.

interconnection and access to UNEs or resale (or services provided by the incumbent pursuant to Section 251)" while simultaneously permitting freer negotiations for those carriers that decide to proceed outside the SGATs' general terms. Lastly, the Commission proposes letting ILECs that are not Bell Operating Companies ("BOCs") file the equivalent of SGATs as well, and proposes to exempt them from the pick-and-choose rule (even though the non-BOC ILECs are not subject to Section 252(f) of the Communications Act).[5]

II. THE CURRENT RULE IS NOT WORKING AS IT WAS INTENDED

QC's experience as an ILEC demonstrates that the current pick-and-choose rule is not working as it was intended, and shows that the proposed modifications will advance the goals of the Act. While it has been QC's experience that many CLECs opt into entire agreements and streamline the interconnection process for both the QC and the CLEC, QC has also been restrained by the pick-and-choose rule in other negotiations out of concern that any customized arrangements it strikes with individual CLECs may later be demanded by third parties, in isolation, without making any of the corresponding trade-offs contained in the agreement.[6]

Qwest agrees that rather than safeguarding against anticompetitive conduct, the pick-and-choose rule serves to impede business negotiations under Section 252.[7] ILECs and CLECs have a fundamental interest in making the interconnection process as cooperative and open as possible, since both parties benefit from well-negotiated and mutually beneficial wholesale

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[5] *See id.* ¶ 727 and n.2151.

[6] *See* Comments of Qwest, CC Docket No. 01-117, at 1 (filed July 3, 2001); *accord*, Comments of Verizon, CC Docket No. 01-117, at 2 (filed July 3, 2001); Comments of BellSouth, CC Docket No. 01-117, at 2-3 (filed July 3, 2001); United States Telecom Association Reply Comments, at 3-4 (filed July 18, 2001).

[7] *See, e.g.,* Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick and Choose," CC Docket No. 01-117 (filed May 25, 2001)("*Mpower Petition*").

arrangements. This is especially true if, as the *FNPRM* proposes, the existing pick-and-choose rule continues to apply to ILEC SGATs. However, based on QC's experience, many interconnection negotiations are currently combative or marked by posturing, delays, threats, and unproductive brinksmanship.[8] Some disputes may be unavoidable given the Commission's TELRIC and unbundling rules, plus the nature of the negotiation process under Section 252. This process is complex, heavily regulated and compulsory, and consequently distorts relations between the parties. Qwest believes that the pick-and-choose rule is not an insignificant part of this problem.

Qwest also believes that the current pick-and-choose rule impairs competition by interfering with the ability of ILECs and CLECs to negotiate effective interconnection agreements. Specifically, the pick-and-choose rule restricts the ILECs' willingness to tailor negotiations and contracts to the specific needs of CLECs and their business plans. Further, the current rule does not realistically reflect the ordinary trade-offs and give-and-take that characterize free negotiations, in which an ILEC would ordinarily be willing to give up one term of a contract in order to get another. This bottom-line approach is how almost all negotiations are done, and it creates more flexibility to negotiate mutually beneficial provisions. Instead, by its basic operation, the pick-and-choose rule pushes the ILECs into rigid and defensive positions during negotiations. ILECs always have to fear that any concessions or flexibility that they offer to one carrier in a specific, contractual context will be used against them out of context in a different negotiation with other parties. This natural reaction to vulnerabilities caused by the pick-and-choose rule tends to frustrate and antagonize CLECs, and adds to an entrenched "us against them" attitude between the parties. This process has also caused Qwest to standardize its

[8] *Id.* at 6-7.

interconnection agreements, in order to streamline the negotiation process and to avoid unwarranted applications of pick-and-choose.

This state of affairs is not the dynamic, market-based system that the Commission anticipated when it enacted the pick-and-choose rule, nor is it what Congress intended when it passed the Telecommunications Act of 1996 ("1996 Act"). The current state of affairs is not efficient, and serves neither the interests of the ILECs nor the CLECs.

As the Commission's *Local Competition Order* makes clear, the pick-and-choose rule was intended to safeguard against favoritism and discriminatory conduct between interconnecting carriers.[9] While it may have prevented discrimination, the pick-and-chose rule has done so at a cost. The availability of the rule has often slowed the negotiation process between carriers, and made it adversarial and rigid. Some CLECs have used the pick-and-choose rule extremely aggressively, as a form of arbitrage, and have tried to expand its use beyond unbundled network elements ("UNEs"), interconnection or resale terms. For example, one CLEC that was negotiating with QC attempted to use the pick-and-choose rule to exclude basic, standard terms and conditions -- such as the requirement that it maintain adequate insurance in case its technicians damaged QC's equipment -- after it located a very different type of interconnection agreement between QC and another carrier that happened not to include an insurance provision. This type of aggressive negotiation behavior has caused QC to standardize the interconnection terms that it offers to other carriers.

QC has filed SGATs in each of the 14 states that comprise its ILEC service territory pursuant to Section 252(f) of the Communications Act, and thereafter using the SGATs as model

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[9] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 16137-38 (1996) ("*Local Competition Order*").

interconnection terms when negotiating with other carriers. The benefit of this approach has been that the SGATs provide consistency, and constitute a negotiating "floor" below which QC's terms and conditions cannot be forced through aggressive arbitrage of the pick-and-choose rule.[10] However, while standardized interconnection terms such as SGATs are efficient, they too come at a cost to innovation and flexibility to both ILECs and CLECs.

III. THERE ARE STRONG POLICY JUSTIFICATIONS FOR THE PROPOSED CHANGES

The overriding purpose of the 1996 Act was to adopt a pro-competitive and deregulatory regime. The ability of carriers to negotiate binding agreements with each other was a cornerstone of the Act. However, as currently constituted, the pick-and-choose rule is plainly not deregulatory, and it has disrupted the negotiation process for both CLECs and ILECs. Qwest therefore supports the modification of the pick-and-choose rule proposed in the *FNPRM*.

Qwest believes that the Commission's proposal will preserve the transparency and anti-discrimination protections that currently exist, particularly with regard to the standard interconnection terms used by many small and medium-sized carriers. As Qwest has discovered from QC's use of SGATs throughout its service territory, permitting CLECs to select provisions freely from the SGATs works well for many smaller carriers that do not have the time or legal resources to haggle over each term of an interconnection agreement. Simultaneously, the Commission's proposal has the benefit of permitting ILECs such as QC to negotiate different terms, conditions and prices as part of a customized agreement when the SGAT approach is not optimal for a particular CLEC.

[10] Of course, individual negotiations remain available, although Qwest cannot realistically deviate materially from the terms of the SGAT without risking pick-and-choose arbitrage.

In addition, the pick-and-choose rule has largely outlived its usefulness as an anti-discrimination measure, at least in its current form. The market for wholesale telecommunications services and facilities has changed greatly since the rule was introduced in 1997, and has become far more competitive. Over the last seven years, CLECs have deployed telecommunications plant throughout the United States that competes with ILEC facilities. In many cases, these CLEC facilities provide an alternative source for wholesale services and UNEs. In this environment, favoritism or attempts to discriminate in its interconnection agreements are not in the economic interest of the ILEC.

The fact that both the ILECs and CLECs, such as Mpower, have expressed frustration with the current state of affairs shows that the pick-and-choose rule is not working well. It is time for a new approach that will encourage more cooperative behavior. As Mpower has indicated in its *Petition* and in subsequent comments in CC Docket No. 01-117, which has been incorporated into this rulemaking, ILECs have begun to change their attitudes: wholesale services are here to stay, and have become a significant source of revenue for ILECs. As Qwest commented in a separate proceeding before the Commission, it does not make economic sense in the current marketplace for an ILEC to try to discriminate against a CLEC, or to prevent the CLECs from making efficient use of ILEC loops -- a condition that would hurt the ILEC and the CLEC alike.[11]

Qwest supports the proposal's retention of a choice of paths for reaching interconnection arrangements -- such as building an agreement from selected portions of the SGATs, or alternatively engaging in direct, intensive negotiations under Section 252. Both parties benefit from this approach. Qwest also believes that the public and transparent nature of the SGATs,

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[11] *See* Comments of Qwest On Further Notice of Proposed Rulemaking, CC Docket Nos. 98-147 and 96-98, at 3 (filed Feb. 27, 2001).

together with the good faith negotiation requirement contained in Section 251(c)(1), the continued illegality of unjust and unreasonable discrimination under Sections 201 and 202 of the Communications Act, and the continued availability of the complaint process under Section 208, all protect against any possible anticompetitive conduct in connection with interconnection agreements.

IV. THE COMMISSION HAS THE LEGAL AUTHORITY TO MODIFY THE PICK-AND-CHOOSE RULE

The *FNPRM* inquires whether the language of the Communications Act, coupled with the Supreme Court's decision in *Iowa Utilities Board*, permits the Commission to modify the pick-and-choose rule under an alternative interpretation of Section 252(i).[12] Qwest submits that neither the Communications Act nor judicial precedent require that the Commission maintain the pick-and-choose rule in its current form, and that the modifications proposed in the *FNPRM* are consistent with both.

While the Communications Act's language appears to mandate the availability of pick-and-choose as a non-discrimination measure, the statute does not mandate the current version of the rule. Section 252(i) provides that:

> Availability to other telecommunications carriers -- A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.[13]

The Commission initially interpreted the phrase "any interconnection, service, or network element" as mandating some kind of pick-and-choose rule. As the Commission found:

> We conclude that the text of section 252(i) supports requesting carriers' ability to choose among individual provisions contained in publicly filed interconnection

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12 *See FNPRM* ¶ 720.

13 *See* 47 U.S.C. § 252(i).

> agreements. As we note above, section 252(i) provides that a 'local exchange carrier shall make available any interconnection, service, or network element provided under an agreement . . . to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.' [footnote omitted]. Thus, Congress drew a distinction between 'any interconnection, service, or network element[s] provided under an agreement,' which the statute lists individually, and agreements in their totality. Requiring requesting carriers to elect entire agreements, instead of the provisions relating to specific elements, would render as mere surplusage the words 'any interconnection, service, or network element.'[14]

On this basis, the Commission decided not only that a pick-and-choose rule was required, but that a new entrant was entitled to request *any* interconnection, service, or network element provided under an existing agreement with another carrier, without having to accept all other terms of that agreement.

The interpretation of Section 252(i) has already been extensively litigated. The Commission's *First Report and Order* appears to state that the current pick-and-choose rule was adopted as a matter of interpretation. Likewise, the Supreme Court has stated that while the current pick-and-choose rule is reasonable, it is also not the only way to read the statute.[15] As the Supreme Court found:

> The FCC's interpretation is not only reasonable, it is the most readily apparent. Moreover, in some respects the rule is more generous to incumbent LECs than § 252(i) itself.…. And whether the Commission's approach will significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions) is a matter eminently within the expertise of the Commission and eminently beyond our ken.

As the Commission is aware, however, the U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit") reached a contrary result when it rejected the Commission's interpretation of Section 252(i), and found that the pick-and-choose rule actually contradicted the plain meaning

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[14] *See Local Competition Order*, 11 FCC Rcd at 16137-38 ¶ 1310.

[15] *See AT&T v. Iowa Utils. Brd.*, 525 U.S. 366, 395-397 (1999) ("*Iowa Utilities Board*").

of the statute and conflicted with the intent of Congress.[16] The Commission had argued before the Eighth Circuit that rather than being open to interpretation, the language of Section 252(i) "simply leaves no room" for an interpretation that does not mandate the pick-and-choose rule.[17]

Fortunately, the Commission does not have to revisit or resolve this thorny issue in this proceeding. The Commission is not trying to eliminate the pick-and-choose rule altogether. Instead, the Commission is proposing only to modify the current pick-and-choose rule, and this modification can be justified both as a reasonable interpretation of Section 252(i) as well as under the plain meaning approach to the statute. The *FNPRM* is plainly proposing to maintain the rule but modify its application, so that it will be limited to SGATs.

Even if Section 252(i) is interpreted as requiring that the Commission maintain a pick-and-choose rule, the statute does not specify what kind of rule it must be, and it does not prevent the Commission from taking such an approach that applies only to the SGAT. Qwest also believes that the proposal is an entirely permissible interpretation of Section 252(i), and lies within the Commission's expertise in interpreting and applying the statute, as the Supreme Court has indicated that the Commission may do. As a result, this is the type of policy change in which the Commission may adopt a different rule as conditions change.[18]

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[16] *See Iowa Utils. Brd. v. FCC,* 120 F.3d 753, 801, *reversed in part, affirmed in part, and remanded, sub nom. AT&T v. Iowa Utils. Brd.*, 525 U.S. 366, 395-397 (1999).

[17] *See Iowa Utils. Brd. v. FCC,* No. 96-3321, Brief for Respondents FCC and United States of America at 113-14 (filed Dec. 23, 1996) (8th Cir.).

[18] *See Burlington N. R.R. v. Surface Transp. Bd.*, 114 F.3d 206, 210-11 (D.C. Cir. 1997).

V. THE RISK OF EXCLUSIVITY AND "POISON PILLS" SHOULD NOT PREVENT THE COMMISSION FROM LIBERALIZING THE PICK-AND-CHOOSE RULE

The *FNPRM* notes the concern of some CLECs that if they are required to opt-in to entire negotiated agreements without the benefit of the pick-and-choose rule, ILECs will insert "poison pill" terms into the agreements that will make them unsuitable for adoption by third parties.[19] While it is true that the Commission noted these concerns in its *Local Competition Order*, Qwest believes that these concerns are overblown. First, restrictions on the availability of particular interconnection agreements should not be a problem to third-party CLECs that genuinely have the same characteristics as the original party, and that are willing to commit to the same volume commitments and trade-offs, particularly since UNEs and SGAT terms would be available as alternatives.

Second, even if an ILEC attempted to use "poison pills" for discriminatory purposes, these schemes would be limited by the good faith and nondiscrimination requirements of Sections 201, 202, and 251(c)(1). Not only would ILECs and CLECs be unable to discriminate by trying to unreasonably restrict the availability of particular terms and particular agreements to third parties, they would have limited incentives to do so, since third-party CLECs would still enjoy multiple paths towards negotiation under Sections 251 and 252, as well as the availability of UNEs as noted above.

Third, Qwest believes that restrictions on the availability of certain interconnection agreements to third parties are necessary in some instances, in order to preserve the trade-offs that are inherent when individualized interconnection packages are negotiated by the parties. It is reasonable to limit particular interconnection terms to carriers of similar size and with similar commercial characteristics. The trade-offs that are contained in negotiated interconnection

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[19] *See FNPRM* ¶¶ 723-24.

agreements are the essence of the economic bargain of the parties, and they cannot work when they are separated and dealt with in isolation, or demanded out of context. In particular, Qwest believes that volume commitments and related price terms are legitimate conditions that should be limited to similarly situated carriers, since the CLEC market includes carriers that range greatly in size and vary widely in their ability to agree to specific volumes of traffic.

VI. CONCLUSION

As Mpower stated in CC Docket No. 01-117 when it first proposed revisions to the pick-and-choose rule, the U.S. telecommunications industry needs to move forward, and needs to find a way to improve the unsatisfactory status quo concerning interconnection between ILECs and CLECs. Qwest believes that the place to start in this effort would be altering the dynamics of the current Section 252 negotiation process. Qwest therefore supports the changes to the pick-and-choose rule proposed in the Commission's *FNPRM*, which Qwest believes will preserve transparency and prevent discriminatory conduct, but at the same time improve the flexibility of the negotiation process and reduce the level of adversarial behavior between ILECs and CLECs.

Respectfully submitted,

By: Michael B. Adams, Jr.
Sharon J. Devine
Michael B. Adams, Jr.
QWEST COMMUNICATIONS
INTERNATIONAL INC.
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 672-2752

Counsel for Qwest Communications International Inc.

October 16, 2003

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that on this 16th day of October, 2003, I have caused a copy of the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be filed with the FCC via its Electronic Copy Filing System, and served via e-mail on the FCC's duplicating contractor as listed below.

Richard Grozier
Richard Grozier

Qualex International, Inc. qualexint@aol.com